No. 78-5885

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

HERBERT G. WILKINS, SR., PETITIONER

v.

UNITED STATES OF AMERICA

ORIGINAL COPY

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES

WADE H. McCREE, JR.
Solicitor General
Department of Justice
Washington, D. C. 20530

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES

Petitioner, proceeding pro se, contends that his court-appointed attorney ignored his request to file a timely petition for certiorari.

In December 1976, after a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioner was convicted of kidnapping, interstate transportation of a female for immoral purposes, and conspiracy, in violation of 18 U.S.C. 371, 1201, and 2421.[1/] He was sentenced to 25 years' imprisonment on the kidnapping count, to be followed by two concurrent terms of five years' imprisonment on the other counts; the latter sentences were suspended in favor of five years' probation. The court of appeals affirmed in June 1977 by judgment order (Pet. App. A).

1/ Petitioner's co-defendant was tried separately, and convicted on similar charges. The court of appeals affirmed and this Court denied certiorari. Smith v. United States, 430 U.S. 948 (1977).

2. The deadline for filing a petition for certiorari in this Court was July 9, 1977. According to the affidavits filed with this petition (Pet. Apps. C, D, E), petitioner's counsel informed him in September 1977 that he had already filed a petition for a writ of certiorari; similar assurances were given to petitioner's wife and minister. In July 1978 petitioner wrote to the Clerk of this Court (Pet. 2), who informed petitioner that no petition for a writ of certiorari on his behalf had ever been submitted (Pet. App. C).

The petition was filed on December 14, 1978, seventeen months out of time. The pro se petition does not directly attack the validity of the judgment of the court of appeals but rather is addressed to the consequences of counsel's alleged failure to file a petition as requested. Petitioner alleges (Pet. 3) that nothing in the record shows that his counsel was released by the court of appeals, or by the petitioner. Since court appointed counsel may not withdraw unilaterally, Anders v. California, 386 U.S. 738 (1967), petitioner contends (Pet. 4) that he was justified in continuing to rely upon his counsel's earlier representations that a timely petition had been filed and that the case was proceeding properly.

The Criminal Justice Act of 1964, 18 U.S.C. 3006A(c), 3006A(d)(6), 3006A(g), provides for the assistance of counsel in preparing a petition for a writ of certiorari. Doherty v. United States, 404 U.S. 28 (1971); Schreiner v. United States, 404 U.S. 67 (1971). Since petitioner apparently has not

received such assistance,[2/] we recommend that this Court grant the petition for a writ of certiorari; vacate the judgment of the court of appeals; and remand the case to the court of appeals for further proceedings, including re-entry of its judgment affirming petitioner's conviction and, if appropriate, appointment of counsel for petitioner to assist him in seeking review in this Court. See Gordon v. United States, 429 U.S. 1085 (1977).

Respectfully submitted.

WADE H. McCREE, JR.
Solicitor General

FEBRUARY 1979

2/ We have assumed for purposes of this response that the representations in petitioner's affidavits are true. We have tried several times to reach petitioner's appointed counsel, but he has not returned our calls. Since petitioner's entitlement to any form of relief, such as appointment of counsel for purposes of preparing a petition for certiorari, may well depend upon the truth of those allegations, which this Court is in no position to determine, we assume the matter will be inquired into as appropriate following remand.